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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Petitioner, Consolidated Gas Company of Florida, Inc. (Consolidated) files this Reply to Briefs opposing *certiorari* filed by Respondent, Federal Energy Regulatory Commission (Commission) and Intervenor, Florida Gas Transmission Company (FGT).

The Court's attention is called to the fact that the District Court decision in *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida, Inc.*, 665 F. Supp. 1493, has been affirmed by the Eleventh Circuit at 880 F.2d 297 (1989).

THE ANTICOMPETITIVE ISSUE

Neither of the Respondents attempt to defend or justify the Commission's failure to rationalize the anticompetitive effect of its order. Instead, the Commission and FGT present, as their principal arguments, a claim that Consolidated did not "preserve" its claim of anti-competitive impact before the Commission or before the Court of Appeals and, consequently, cannot raise the issue here.

Such arguments are absurd. This entire case is about obstructions to fair competition and the Commission was aware of that aspect of the case throughout the proceeding. When City Gas Company (City Gas) began to solicit Petitioner's customers, Petitioner sought to preserve its competitive position in its market by requesting a natural gas supply from FGT on the same terms made available by FGT to Consolidated's competitor, City Gas, that is, a city-gate delivery of natural gas at the FGT tariff rate. FGT raised a major obstacle—Consolidated must agree to pay the cost of the connecting facilities (contribution in aid of construction or CIAC)—an obstacle City had never had to meet. Consolidated sought relief from the Commission by filing its appplication pursuant to Section 7(a) of the Natural Gas Act. City Gas intervened and attempted to block Consolidated's access to natural gas. FGT obliged City Gas, its second largest resale customer, by demanding a CIAC from Consolidated even though FGT's tariff did not require a CIAC from a new customer.[1] While the Commission delayed the administrative proceeding, City Gas in-

[1] FGT states: "The defective tariff language that gave rise to Petitioner's claim below has been corrected." (FGT Br., p. 4)

vaded Consolidated's service area and attached all of its commercial customers, the cream of its market. When the Commission finally acted, it imposed the unjustified condition in its order requiring Consolidated to pay a CIAC that was greater than 50% of Consolidated's total net investment in its plant. That condition has been the subject of continuing litigation since 1984.

Thus, the anti-competitive effect of a requirement that Petitioner reimburse FGT for the cost of the facilities required to connect the FGT pipeline to Petitioner's system has been present in this case from its inception to the present time. The antitrust proceeding was initiated while the administrative proceeding was in progress, and the Commission knew it. (A-59, ftn. 13) In a Motion For Prompt Hearing filed February 4, 1983, Consolidated pointed out that City Gas was continuing to raid Consolidated's market in an effort to undermine the economic feasibility of Consolidated's investment and that the delay in setting the matter for hearing was allowing City Gas to destroy Consolidated. In its Initial Brief, Consolidated argued:

> Over the years, the Commission (and its predecessor) have seen many prolonged cases where coal interests, petroleum interests and maritime interests have used and abused the administrative processes of this Commission. City is following a similar path. It is attempting to use the hearing procedures of this Commission to block or at least delay access by a competitor to a supply of competitively priced wholesale service. The use of monopoly power to maintain a competitive

> advantage or to destroy a competitor is unlawful. *United States v. Griffith*, 334 U.S. 100, 107 (1948). This Commission should not tolerate such predatory, non-competitive actions. *Cf.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

In his Initial Decision the ALJ observed that:

> Fleisher also testified that the application should be granted so that the Commission does not 'aid and abet' the anti-competitive efforts of City Gas. (A-48)

The ALJ's decision gave Consolidated a supply of gas on competitive terms, ruling that FGT's tariff did not require a contribution, that FGT's tariff did not contain the express language required by Commission regulations if a contribution was to be required and that absorption of the cost of the lateral by FGT was in the public interest. (A-46-47) When the Commission overruled the ALJ and required Consolidated to pay the full cost of the connecting lateral and meter station, despite the fact that FGT's "defective" tariff did not require such a contribution by new customers, and City Gas had not paid any connection fee, the Commission *aided and abetted* City Gas' destructive invasion of Consolidated's market.

The anti-competitive nature of the Commission's condition was called to the Commission's attention in Petitioner's Application for Rehearing, after the Court's remand, when Petitioner stated:

> There was no showing that Consolidated's competitors will be harmed if FGT bears the

> cost of the lateral; *indeed the record demonstrated that imposing the cost of the lateral on Consolidated would severely impair its ability to compete with City Gas Company* in an effort to recover the commercial and residential customers taken from Consolidated by City Gas Company while this case was stalled in litigation (JA 167) (Emphasis added)
>
> * * *
>
> During that 5 year period of bureaucratic delays, City Gas Company (which has 11 laterals connecting its system to the FGT system, all constructed at FGT's expense) took over all of Consolidated's commercial customers and some residential customers seriously impairing Consolidated's revenue stream. The Commission's dilatory action in its Opinions 225, 225-A, and 225-B have injured both Consolidated and the consuming public. (JA 171-2)

This objection stated in Petitioner's Application clearly identified the anticompetitive issue demanding Commission attention as required by Section 19(a) and (b) of the Natural Gas Act. The Commission's obligation to justify the anticompetitive effect of its order is a direct legal obligation. Consequently, it was not necessary to formally request the Commission to consider the District Court's antitrust decision.

Petitioner's Initial Brief to the United States Court of Appeals included a five page discussion under the heading:

"(e) *The Commission's Order is Anti-Competitive*"

In that discussion, Petitioner argued:

> The Commission's action of imposing the cost of the connecting lateral on Consolidated when the competing dominant seller in the area, City Gas, received numerous supply laterals at the pipeline's expense, would severely prejudice Consolidated's competitive position. (Initial Br., p. 27)
>
> * * *
>
> A common predatory strategy occurs where regulatory action is required for entry into a market. An incumbent firm (City Gas) can increase the cost of entry for a new firm (Consolidated) by vigorously contesting the required regulatory approval. In the instant case, not only did City Gas succeed in imposing a significant litigation cost and delay of entry upon Consolidated; the Commission assisted City Gas by imposing on Consolidated the cost of the connecting lateral required for Consolidated to enter the natural gas market, despite the fact that City Gas receives city gate service from FGT at FGT's expense.
>
> The Commission's reasoning is sheer nonsense. The concept of a "level playing field" on which competitors can compete on equal terms has been adopted time and again by this Commission. Yet its ruling in this case tips the playing field radically against Consolidated and gives its competitor an unfair advantage. Far from demonstrating that allowing Consolidated to receive its lateral at

> the pipeline's expense would grant a cost advantage to Consolidated and do competitive harm to City Gas, the facts demonstrate that imposing the cost of the lateral on Consolidated will inflict significant competitive harm on Consolidated. (Initial Br., p. 30)

Petitioner called to the Court's attention the fact that the U.S. District Court had ruled that "City Gas, a monopolist controlled an essential facility" (Initial Br., p. 27) and that the District Court had concluded that "Consolidated would have encountered a prohibitive transportation problem" and that imposing the cost of the lateral on Consolidated created a "grave doubt as to whether Consolidated could have effectively competed with City Gas." (Initial Br., p. 28) Finally, Petitioner concluded that:

> The condition imposed is anti-competitive and without any substantial support in the record. (Initial Br., p. 33)

Consequently, although no extensive "legal" argument addressing the anti-competitive impact of the Commission's order was made before the Commission or the Court of Appeals, the factual argument that the Commission's order was prejudicially anti-competitive was clearly stated in the Application for Rehearing and is properly before this Court. The Commission is presumed to be an expert body with a full knowledge and understanding of its legal obligations. One of those obligations is to conduct its responsibilities in consonance with national policies favoring competition. The Commission can impose a condition having anticompetive effects, but it must find another overriding public policy in order to jus-

tify an anticompetitive condition. There was no such finding nor is there any factual basis for such a finding in this case. The Commission simply acted arbitrarily and capriciously in flagrant violation of its obligations when it imposed an anticompetitive condition on Petitioner.

Although the objection to the Commission's order that it was anticompetitive was raised in Consolidated's Application For Rehearing after remand, in accordance with Section 19(a) and (b) of the Natural Gas Act (15 U.S.C. §§ 717(a) and (b), the Court of Appeals, for reasons unknown, chose not to address the issue. That unexplained failure to rule on an issue squarely before the Court was a clear error.

INTERPRETATION OF FGT'S TARIFF

FGT renews the argument that its admittedly "defective" tariff, if read literally, was unduly discriminatory in requiring existing customers to pay a CIAC but not requiring a new customer to make such a payment and that FGT should not be bound by its own tariff. (FGT Br., p. 5) The Commission adopted that (erroneous) argument and compounded its error by "construing" the tariff to require new customers to pay a CIAC which the tariff did not require. (J.A. 154, 155) The U.S. Court of Appeals explicitly rejected that justification for the Commission's decision (A-6). Consequently, FGT's argument that Section 4(b) of the NGA (which proscribes undue discrimination) precludes agency action requiring FGT to bear the cost of the lateral to a new customer was explicitly and properly rejected by the Court of Appeals.

Both Respondents quote a statement from Petitioner's Motion For Stay of Order as a basis for

denial of *certiorari*. All that that statement of counsel said was that if the Court upheld the Commission's condition and Consolidated had a choice of paying the CIAC in order to retain its remaining customers or of losing the entire value of its existing investment, Consolidated would pay the CIAC in order to remain in business. That was no concession that the CIAC would not be an extraordinary burden on Consolidated's competitive position.

CONCLUSION

This Commission has made a great show in recent years of its commitment to pro-competitive policies and "level playing fields" as it forces a restructuring of pipeline services. But, in this case, where the Commission's action would have a direct anticompetitive effect on a small entity trying to maintain its market against a large dominant entity engaged in driving Petitioner out of business, the Commission totally ignored those policies, ignored the literal terms of an applicable tariff, ignored the express requirements of its own regulations, and imposed an anticompetitive condition without any foundation.

Such willful disregard of statutory responsibilities should not be allowed to stand. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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